No. 2016

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AETNA LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

PORTLAND GAS & COKE COMPANY,
a Corporation,

Defendant in Error.

Plaintiff in Error's Brief.

In Error to the District Court of the United States for the District of Oregon.

SENN, EKWALL & RECKEN,
Attorneys for Plaintiff in Error.

JOHN A. LAING and H. W. STRONG,
Attorneys for Defendant in Error.

German Publishing Co.

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STATEMENT OF FACTS.

The defendant in error was constructing a gas plant near the City of Portland, in Multnomah County, Oregon, and in doing this work employed a large number of men. The plaintiff in error issued to the defendant in error an indemnity policy, providing that the plaintiff in error "agrees to indemnify the defendant in error against loss and/or expense arising or resulting from claims upon the assured for damages on account of bodily and/or death accidentally suffered, or alleged to have been suffered by an employe or employes of assured." The assured in this case being the defendant in error.

During the construction work the defendant in error provided water for drinking purposes for its employes. This water was obtained from a nearby spring and also from the Government Moorings well. A number of employes contracted typhoid fever. These employes made claim against the defendant in error for damages, and several of them brought suit in the State courts of Oregon. Some of the cases were tried and others were settled. The employes alleged that the drinking water was contaminated with typhoid germs, and that the defendant in error was negligent in providing them contaminated water.

Plaintiff in error contended at the time the employes made claim, that the policy of insurance did not cover typhoid fever—that typhoid fever was not a bodily injury accidentally suffered, and refused to defend the claims of the employes. The defendant in error, at its expense, defended the suits of the employes and eventually settled the claims. The defendant in error, after adjusting the claims of the employes, brought suit in the United States District Court, for the District of Oregon, and secured judgment against the plaintiff in error for the amount paid the employes and for the expenses incurred in adjusting the claims and suits of its employes.

The complaint of the defendant in error sets forth a copy of the policy and alleges that the policy provides for reimbursement in cases of bodily injury.

accidentally suffered. The plaintiff in error filed a demurrer to this complaint on the ground that typhoid fever was not a bodily injury, accidentally suffered, and did not come within the purview of the policy. This demurrer was overruled. The case was tried by the Judge of the District Court of the United States, for the District of Oregon, sitting without a jury, the jury having been specifically waived by stipulation in writing. After hearing the testimony, and after the introduction of the policy of insurance, the District Court gave judgment in favor of the defendant in error, as prayed for in its complaint. The plaintiff in error excepted to the rendering of a judgment in favor of the defendant in error, and submitted to the District Court its proposed findings of fact and conclusions of law. These findings of fact and conclusions of law were rejected by the District Court, and an exception allowed, and the findings of fact and conclusions of law submitted by the defendant in error were allowed and a judgment rendered thereon.

The only question for solution in this appeal is whether or not typhoid fever constitutes a bodily injury, accidentally suffered. The District Court of the United States, for the District of Oregon, decided that typhoid fever contracted from drinking water was a bodily injury, accidentally suffered.

POINTS AND AUTHORITIES.

Bradbury's Workmen's Comp., Vol. 1, pages 339, 358.

Adams v. Acme White Lead & Color Works, 148 N. W. (Mich.) 485.

McCoy v. Michigan Screw Co., 147 N. W. (Mich.) 572.

Lickleider v. Iowa State Traveling Men's Assn., 151 N. W. (Iowa) 479.

Wright v. Order of Com. Trav., 174 S. W. (Mo.) 833.

Lehman v. Great Western Accident Assn., 133 N. W. 752.

Shanberg v. Fidelity & Casualty Co., 158 Fed. 1.

Bacon v. U. S. Mutual Accident Assn., 123 N. Y. 304.

Standard Life & Accident Insurance Co. v. McNulty, 157 Fed. 224.

Doser v. Fidelity & Casualty Co. of New York, 46 Fed. 446.

Smith v. Travelers' Ins. Co., 106 N. E. (Mass.) 607.

Appel v. Aetna Life Ins. Co., 83 N. Y. S. 238.

Elsey v. Fidelity & Casualty Co., of N.Y. 109 N.E. 413 [Advance Sheets.]

ARGUMENT.

The words "bodily injuries accidentally suffered" have a legal and technical meaning in the law of

insurance. "Bodily injury" is used in contradistinction to "bodily disease." "Accidentally suffered" is contradistinguished from an injury suffered through the natural course of events.

Bouvier defines an accident as an "event" which under the circumstances is unusual and unexpected by the person to whom it happens. In this case there was nothing accidental. The drinking of the water was a usual and natural matter. It was intentional—it was not unforeseen. The act itself must be accidental, and not the result or the consequence of the act. An unforeseen or unusual result from an intentional act is not an accident.

As was said by the Court in the case of Shanberg v. Fidelity & Casualty Co., 158 Fed. 1:

> "The disease from which the assured was suffering at the time of his death was not enumerated in the policy, and, as we view the case there was no accident in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is the rupture of the heart—an accident. That was the result, and not the means through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily and in an ordinary way with no unforeseen accidental or involuntary movement of the body whatever. There was no stumbling, slipping or falling; there was nothing accidental in his movements,

> any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not purport to be a contract of indemnity against death or injury by all means."

One of the ablest and latest works on this subject, Bradbury's Workmen's Compensation, Volume 1, page 339, discusses the meaning of the word "accidental" at length, and on page 358 this authority used the following language:

> "If a germ caused a bodily ailment without an abrasion of the skin, the general rule is that the result is a disease and not an accidental injury, within the meaning of an accident insurance policy. Bacon v. U. S. Mutual Accident Assn., 123 N. Y. 304."

The English Act of 1897 was entitled:

> "An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment."

The body of the act provided as follows:

> "If in any employment, to which this act applies, personal injury by accident arising out of and in the course of employment, is caused to any workman, his employer shall be liable."

In the case of Steel v. Gammell Laird Co., Ltd., (1905), 2 K. B. 232, it appears that a caulker in the employment of shipbuilders was seized with paraly-

sis, caused by lead poisoning, and became totally incapacitated as a result thereof. Lead poisoning may be caused by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. It was held in that case that lead poisoning could not be described as an "accident," in the popular and ordinary use of that word. This decision, and others of a like nature, caused the enacting power of Great Britain in 1906 to pass an amendment which was entitled as follows:

> "An act to amend the law with respect to compensation to workmen for injuries suffered in the course of their employment."

Thus the word "accident" was eliminated so as to cover occupational diseases.

It will be noticed that the policy of insurance under consideration uses the words "bodily injuries, accidentally suffered."

In the case of Hood & Sons v. Maryland Casualty Co., 206 Mass. 223, the Supreme Court of Massachusetts had under consideration a case where an employe contracted glanders while cleaning up stalls of horses infected with the disease. The Court held that that was a bodily injury, accidentally suffered. This cause, however, differs materially from the defendant in error's contention. The glanders is an infectious disease. No notice was given the employe that the horses had been afflicted with the disease. This was accidental. However, the drinking of water was natural and intentional, and the

bacilli in the water causing the typhoid fever was a mere result of an intentional act and not the result of an accident. If a bacilli should be thrown into a person's eye, and it became infected, this would be an accident; such an act is not intentional or usual, but it is accidental and extraordinary.

In the case of Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. Appeal 157, a like state of facts as in the Massachusetts case was presented for consideration. An employe contracted kidney disease because of the handling of infected rags, and the Court held that this was an accident. However, typhoid fever caused by bacilli germs is not an accident. In no other way can the disease of typhoid fever be caused except by the bacilli. It is thus nothing unusual or extraordinary or unforeseen, but the poisoning of the body by infection with glanders or something of that nature is unusual and unforeseen. In the one case we have a well-understood disease; in the other we have an unusual occurrance, an unlooked-for event; the infection is the accident. On the other hand we have the natural drinking of water, which under no circumstances can be considered an accident.

As has been said by numerous authorities, a disease produced by a known cause is not a bodily injury accidentally suffered within the purview of an employer's policy, nor can typoid fever be considered a bodily injury in the ordinary and usual acceptation of the term. Bodily injury, under an

insurance policy means some unusual unforeseen affliction; an infection of the skin or a bruise of the skin by coming in contact with an obstacle, but an injury to the body by means of a contracted disease, such as typoid fever or tuberculosis cannot be considered a bodily injury in the ordinary sense. If typhoid fever, contracted from the drinking of water can be considered a bodily injury, accidentally suffered, then every known disease can be placed in the same category. An accident policy would then cover every disease. Insurance policies of this nature have a definite and well-established meaning. It was never intended that a policy of this nature should include a disease. It would place upon the insurance company a liability and a loss never contemplated. An insurance policy being a contract, the intention of the parties should receive consideration.

SENN, EKWALL & RECKEN,
Attorneys for Plaintiff in Error.